

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| OSSAMA HASSAN | : | DETERMINATION |
| | : | DTA NO. 819688 |
| for Revision of a Determination or for Refund of | : | |
| Sales and Use Taxes under Articles 28 and 29 of the | : | |
| Tax Law for the Period December 1, 1997 through | : | |
| February 28, 2001. | : | |

Petitioner, Ossama Hassan, 42-43 Ithaca Street, Apt. 5K, Elmhurst, New York 11373, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1997 through February 28, 2001.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 9, 2004 at 10:30 A.M., with all briefs to be submitted by November 22, 2004, which date commenced the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional sales tax due from Ossama Hassan.

II. Whether petitioner has established any facts or circumstances warranting the reduction or abatement of penalties imposed.

FINDINGS OF FACT

1. Petitioner, Ossama Hassan d/b/a Empire Deli Pita King, operated a small grocery store and deli in Flushing, Queens County, New York. The store, opened at the end of 1996, was located on Woodhaven Boulevard, a busy thoroughfare, and sold items such as bagels, rolls, juice, candy, sandwiches, cigarettes, coffee, tea and soda. Petitioner operated the store's business on a day-to-day basis, with help from his wife and from his brother. Petitioner kept track of sales based on the amount of money in the cash register. He paid for the store's supplies and inventory with cash and, at times when there was insufficient cash, with his own credit card. At the end of each business day he would count the cash and keep it for purchases for the next business day. Sometimes, but not always, he would write down the amount of cash.

2. On September 20, 2001, an auditor for the Division of Taxation ("Division") sent a letter to petitioner scheduling an appointment for October 23, 2001 on which to commence a sales and use tax field audit of petitioner's business for the period spanning December 1, 1997 through February 28, 2001. The Division's letter requested that all of petitioner's books and records pertaining to the store for the audit period be available for review. Among the records specifically requested were the general ledger, cash receipts journal, Federal income tax returns, purchase invoices, sales invoices, guest checks, cash register tapes, bank statements, financial statements and exemption documents.

3. The Division's auditor met with petitioner at the store location on October 23, 2001, at which time petitioner provided some bank statements, income tax returns and cigarette invoices. Petitioner did not provide any general ledger, daybook of sales, cash receipts journal, cash register tapes, sales invoices, daily summary tapes, exemption documents or sales tax accrual account information. The auditor was advised that the sales tax returns filed for the business

were prepared by petitioner's brother based on an estimate of the store's sales. For the audit period, the business reported gross sales of \$42,000.00 and taxable sales of \$5,700.00. After reviewing the very limited records presented, the Division's auditor determined that the same were not sufficient to allow the conduct of a detailed audit and concluded that the use of indirect auditing methods to determine petitioner's sales would be appropriate.

4. The Division conducted an observation of petitioner's business on December 5, 2001. An initial audit interview report, completed either by petitioner or by his brother, states that the business was open Monday through Saturday from 8:00 A.M. to 6:00 P.M. However, on the December 5, 2001 date of the audit observation, the store was opened at 7:00 A.M. and was closed at 4:00 P.M. The auditor, and her audit team leader, observed and recorded the store's sales during the hours of operation, segregating the same into taxable versus nontaxable categories. They recorded gross sales of \$162.74, of which \$131.74 were taxable sales. Dividing such taxable sales by the nine-hour period of observation resulted in taxable sales of \$14.56 per hour.

5. The auditor multiplied the above-determined \$14.56 per hour taxable sales figure by 11 hours to arrive at \$160.11 in audited taxable sales per day. The 11 hours per day figure reflects the auditor's choice to treat the 7:00 A.M. actual opening time on the audit observation day as the usual opening time, as opposed to the 8:00 A.M. time petitioner reported on the initial audit interview sheet, and (in contrast) to accept the 6:00 P.M. closing time petitioner reported on such interview sheet as the usual closing time, as opposed to the 4:00 P.M. actual closing time on the audit observation day.

6. In turn, the auditor multiplied the \$160.11 audited taxable sales per day by the 91 days in each sales tax quarterly period (13 weeks times 7 days per week equals 91 days) to arrive at

\$14,570.00 of audited taxable sales per quarter. The auditor's conclusion that petitioner's store was open 7 days per week, as opposed to the 6 days per week reported on the initial audit interview sheet, was apparently based on her audit experience involving similar stores, many of which are allegedly open for long hours, including some which operate 24 hours per day and 7 days per week.

7. The auditor multiplied the audited taxable sales per quarter (\$14,570.00) by the 13 quarterly periods covered by the audit to arrive at \$189,411.00 in audited taxable sales for the audit period. The auditor reduced audited taxable sales by taxable sales reported by petitioner (\$5,700.00) to arrive at additional taxable sales of \$183,711.00 and sales tax due thereon in the amount of \$15,156.00. The auditor estimated that petitioner sold three packs of cigarettes per day, and thus further reduced the amount of sales tax due for the audit period by \$532.00, representing credit for the tax prepaid by petitioner (at the amount of 45 cents per pack) on cigarettes.

8. On May 28, 2002, the Division issued to petitioner a Notice of Determination, based on the foregoing audit results, assessing additional sales tax due for the period December 1, 1997 through February 28, 2001 in the amount of \$14,623.96, plus penalty and interest thereon. The Division thereafter reduced the amount of tax assessed to \$12,374.82, plus penalty and interest thereon, with such reduction based on the fact that the earliest two quarterly periods (those ended February 29, 1998 and May 31, 1998) were barred by the period of limitations on assessment.

SUMMARY OF PETITIONER'S POSITION

9. Petitioner makes no argument that he maintained or made available complete and adequate records for audit, as required. Rather, petitioner raised a number of assertions relative to the accuracy of the audit, including the claims that the store was not open seven days per week

but rather was closed on Sundays (and on holidays), that business was very slow on Saturdays, and that the store was only open until 4:00 P.M. as opposed to 6:00 P.M. Petitioner also maintains that the Division's observation of sales should have been for a period longer than one day, so as to account for days on which sales were lower than those on the observed day. In this respect petitioner alleged that his average sales were approximately \$50.00 to \$75.00 per day, which is far lower than the amount determined by the Division via observation. Petitioner also alleges that he should have been provided a greater credit for prepaid tax on cigarettes. Finally, petitioner provided copies of bills and letters showing overdue balances for the store lease payments and for utilities, urging that such information supports his claim that sales were lower than those determined upon audit, that he was unable to pay his expenses of operation, and that he was forced to close the business in 2002.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ' (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025;

Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).

B. In this case, the record clearly establishes the Division's clear and unequivocal written request for books and records of petitioner's sales, and petitioner's failure to keep or produce such records for the Division's review. The auditor reasonably concluded that petitioner did not maintain books and records that were sufficient to verify his gross and taxable sales for the audit period. Having established the insufficiency of petitioner's books and records, the Division properly resorted to external indices in the form of a one-day observation test of petitioner's gross and taxable sales. Petitioner, for his part, does not dispute either the absence of sales records or the Division's authority to resort to indirect audit methodologies in this case. While petitioner asserts that the Division should have observed sales on more than one day so as to account for alleged day-to-day sales fluctuations, the extrapolation of the results of a one-day observation test over a multi-year period to determine gross and taxable sales has been consistently sustained (*see, Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989, 613 NYS2d 967; *Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878, 589 NYS2d 102; *Matter of Marte*, Tax Appeals Tribunal, August 5, 2004). Hence, the only issue is whether petitioner has established that the amount of tax assessed as the result of the application of such method was erroneous.

C. Petitioner takes issue with the Division's audit method and result because it is imprecise. As a general proposition, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of his sales as required by Tax

Law § 1135(a)(1) must be borne by that taxpayer (*Matter of Markowitz v. Sate Tax Commission, supra.*). Nonetheless, review of the audit extrapolation calculations in this case reveals that it is appropriate to adjust the audit results in one respect, to wit, to reflect that the store was not open seven days per week. The Division chose to extrapolate its observation results using seven days per week, apparently on the basis that “many similar stores are open seven days per week” (*see* Finding of Fact “6”). Such a proposition may be true in general, and would be a proper basis for extrapolation if there were no other evidence in the record concerning the store’s days of operation (a seemingly simple matter to verify by casual observation). However, the information provided on the initial interview sheet, as well as petitioner’s consistent claim and testimony, was that the store was open six days per week. On this score, the initial audit interview sheet indicates that the store was open Monday through Saturday (i.e., six days per week) and was closed on Sundays. Petitioner’s testimony at hearing was consistent in this claim that the store was not open Sundays (or holidays). Unlike the situation with the store’s hours of operation, where the Division’s extrapolation was based on evidence provided and gathered on audit (a combination of the hours of operation actually observed and the hours of operation reported on the interview sheet [*see* Finding of Fact “5”]), the auditor’s conclusion on the store’s days of operation overrode the evidence and was simply based on the assumption that the store was open seven days per week. While the Division has considerable latitude in its choice and application of audit methodology where the taxpayer fails to keep and make records available, its application of the information provided in this case was inconsistent with the evidence in this one aspect and, absent any evidence that the store was open

on Sundays, modification is warranted. Accordingly, the Division is directed to recalculate the amount of taxable sales and sales tax due based on a six-day week rather than a seven-day week.¹

D. Petitioner has provided no basis upon which penalties, properly imposed, should be reduced or abated, and the same are, therefore, sustained.

E. The petition of Ossama Hassan is hereby denied and the Notice of Determination dated May 28, 2002, as reduced to reflect elimination of the earliest two sales tax quarterly periods covered thereon (*see* Finding of Fact “8”), and as further reduced in accordance with Conclusion of Law “C”, together with penalties and interest thereon, is sustained.

DATED: Troy, New York
February 10, 2005

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

¹ No such modification is warranted with respect to the store’s hours of operation. In this respect, the Division chose to extrapolate its observation results using an 11-hour day (rather than on the nine hours of physical observation), based on the actual observation day opening time of 7:00 A.M. (i.e., one hour earlier than the time listed on the interview sheet) through 6:00 P.M. (the closing time listed on the interview sheet rather than the 4:00 P.M. actual closing time on the observation day). Given the vague, inconsistent and conflicting testimony by petitioner regarding his hours of operation, the Division’s use of actual opening time and reported closing time (a mixture of observed and reported times) was supported by the evidence and was reasonable.